Notre Dame Journal of Law, Ethics & Public Policy

Volume 5
Issue 4 *Symposium on Civil Disobedience*

Article 7

February 2014

Civil Disobedience and Abortion Protets: The Case for Amending Criminal Trespass Statutes

Paul R. Davis

William C. Davis

STUDENT ARTICLES

CIVIL DISOBEDIENCE AND ABORTION PROTESTS: THE CASE FOR AMENDING CRIMINAL TRESPASS STATUTES

PAUL R. DAVIS*
WILLIAM C. DAVIS**

Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all *issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.*

- Thornhill v. Alabama
310 U.S. 88, 102 (1940)
(emphasis added).

I. INTRODUCTION

Laws composed by humans are never perfect. Human life is sufficiently complicated that any general governmental requirement or prohibition will admit of exception, and no matter how equitable a law is in general, there will be situations in which it is less than equitable for it to be applied.[1] Valid restrictions on the applicability of generally equitable laws are often discovered, brought to light by particularly perplexing cases.[2] We intend to show here that the activities of Operation Rescue make evident the need to qualify the legitimate rights

* B.A., Communications, Wheaton College 1987; B.A. History, Covenant College 1987; J.D., University of Notre Dame 1991; Thomas J. White Scholar, 1989-91.

** B.A., Philosophy, Covenant College 1982; M.A.R., Westminster Theological Seminary 1986 (Escondido, CA); Ph.D Candidate, University of Notre Dame, 1992.

1. *See, e.g.*, ARISTOTLE, NICOMACHEAN ETHICS 143-45 (1137a32-1138a3) (Hackett ed. 1985); ARISTOTLE, RHETORIC 1370-72 (1373b1-1374b24) (Random House ed. 1941).

2. For example, not every homicide is a murder. Exceptions are made for self-defense, accidents and insanity. In these cases, the person doing the killing would be found not guilty of murder.

protected by criminal trespass statutes. Accordingly, the thesis of this paper is two-fold: (1) to show that as the statute is presently applied, Operation Rescue activities which conform to the stated intentions of their organizers constitute "justifiable" civil disobedience; and (2) to provide an amendment to the criminal trespass statute which would make the law sensitive to the overriding rights and duties involved in situations sharing the features highlighted by Operation Rescue activities. Establishing this two-part thesis is divided into three sections. The first section covers several preliminary considerations concerning the moral foundation for the application of particular laws, civil disobedience in general, rights relating to informed moral choice and the characteristics of Operation Rescue as ideally conceived. The second section briefly outlines the proposed amendment. Finally, the third section defends the claim that the proposal is justified as a matter of constitutional law, sound public policy objectives and rational thought.

II. PRELIMINARY CONSIDERATIONS

A. *Concerning the Grounds on Which Laws Are Justified*

Laws can be usefully divided into two classes: first, there are laws which prohibit or require actions which independent moral considerations also prohibit or require.[3] Second, there are laws which are not also moral matters[4] and are purely matters of expedience.[5] It is a moral failure to set fire to your children, and laws are enacted to provide civil and criminal sanctions for such behavior. Clear examples of laws of expedience are less obvious, but many traffic laws fall into this category.[6]

---

3. This corresponds to actions which are generally referred to as "malum in se" ("evil in itself").

4. This refers to actions which are "malum prohibitum" ("wrong because it is prohibited").

5. Some advocates of Utilitarianism recognize only one class of laws. *See generally* J. SMART & B. WILLIAMS, UTILITARIANISM: FOR AND AGAINST (1973) (identifying the moral with the expedient, and thus concluding that this amounts to a distinction without a difference). An identification of this sort, however, is a simplification that ignores common sense opinion. It may very well be that all actions which are truly expedient are also morally permissible, but it is difficult to see how this could be proven. Most would agree that sometimes the morally correct thing to do is not what is expedient.

6. In fact, there is essentially a continuum between matters which are purely moral and purely expedient. Laws against exceeding 65 miles per hour, for example, fall towards the expedient end of the continuum even if not a matter *purely* for expedience. In the absence of such a law, we would not

The distinction between laws based in morality and those based (purely) in expedience, although hard to apply in some cases, is important when arguments are offered concerning the change of an existing statutory provision. For laws based purely in expediency, a change can usually be justified by providing a persuasive indication that the altered, as altered, law would be *more* expedient. For example, the decision to allow right turns on red lights does not depend for its justification on a demonstration that, contrary to the existing (unqualified) law, turning right on red is really morally permissible. For laws based even in part on moral considerations, however, arguments for change must address both morality and expedience.

While the argument of this paper would be greatly simplified if laws regarding trespassing were merely matters of expedience, such is not the case. Trespass laws have a foundation in *both* moral considerations and in expedience. Similarly, with Operation Rescue activities several moral concerns are involved, and so both expediency and moral arguments are required. Arguments against amending the criminal trespass statute in response to Operation Rescue activities only need to show that such activities are *either* productive of more harm than benefit, *or* that they are morally offensive, *or* that such amendment is violative of the U.S. Constitution. Thus if our amendment is to be justified, we must show that Operation Rescue activities are *neither* harmful nor morally objectionable, and that the amendment is in accord with the Constitution. We will establish each of these premises, but while arguments about expedience require little introduction, a number of introductory comments are required concerning arguments about the morality of an action.

If it were possible, the easiest way to settle disputes about the moral status of an action would be to give a detailed account of what it *is* for an action to be moral or immoral, and then to show that the action in question possessed the necessary and sufficient qualities to count as one or the other. Accounts like this are available, but they are either overly simplistic and counter-intuitive, or overly general and impracticable.[7] Consequently, it is necessary to consider instead how it is

think that the presence of a speed limit sign would make driving faster than 65 miles per hour a moral failure.

7. *See generally* J. MILL, UTILITARIANISM 7 (Bobbs-Merrill rev. ed. 1957) (identifying the morally right with that which produces the greatest amount of pleasure—known as the "hedonic" utilitarianism). *See also* G. MOORE, PRINCIPIA ETHICA 147 (Cambridge rev. ed. 1965) (identifying the morally right with that which produces the greatest amount of "goodness"). Moore

that we *come to know* that a particular action is morally right or wrong. In this regard, we will consider two qualities that actions can possess which indicate their moral value. Since moral rightness is considerably more complicated than moral wrongness, we will further limit our analysis to moral wrongness.

The two qualities which an action can possess, either of which would indicate that the action is morally wrong are

(a) that the action is on balance harmful either to the individual or to others, or
(b) that the action is offensive to human moral sensibilities.

Each of these deserves comment.

First, we can come to know that an action is wrong if it can be shown that the action is on balance harmful when all its effects have been weighed. This is sufficient to show that the action is morally wrong. It is necessary to include the "all effects have been weighed" qualification, because many morally laudable actions are harmful in the short term (e.g. cutting off someone's arm is harmful in itself, but if it is done in order to prevent the spread of a life-threatening infection the action is not harmful "on balance"). Various utilitarian calculi can be employed to assess the overall harmfulness of an action; all of them have limitations, but usually it is possible to reach some agreement about the *fact* of overall harmfulness, even if its extent is much harder to calculate.[8] It should be noted that although overall harmfulness is a sufficient indicator of moral wrongness, overall benefit is not a sufficient indicator of moral rightness. For example, to kill a person suffering from a contagious disease may produce a preponderance of benefit to all those spared by not contracting it, but that would not make such a killing morally right.

The second indicator of moral wrongness (being morally offensive)[9] is included for two reasons. First, on balance

admits that his account is all but impossible to apply, and Mill's account is consistent with startling conclusions about just punishment.

8. For an account of the difficulties attending calculations of this sort, see G. MOORE, *id.* at 149-57.

9. We are assuming that all those addressed by the argument possess very similar moral sensibilities, i.e. that any two likely readers, if presented with the same simple description of an action, would experience similar reactions to it. This was a nearly unquestioned assumption in 18th century moral philosophy (Francis Hutcheson, David Hume, Thomas Reid and Immanuel Kant all took it for granted), but the diversity of moral opinion today might make it seem less plausible. In spite of this diversity, we believe

harmfulness is not a necessary feature of morally wrong actions (for example, the desire to kill another is morally wrong, but it is not clear that it is harmful unless it is acted upon).[10] The second reason moral offensiveness needs to be included is that in many cases it is the awareness of offensiveness that registers the clearest charge against the action. Often it is the pre-reflective reaction of offense, an immediate sense that something is not right, that encourages us to consider the harmfulness of an action. Without this perception of moral wrongness, many truly harmful actions might go unanalyzed. This is not to say that we are justified in holding an action to be morally wrong only if we show that it is on balance harmful. Some actions which produce neither a surplus of benefit nor a surplus of harm are nonetheless known to be morally wrong because they are offensive.[11]

Moral offensiveness, however, is difficult to analyze. In order to justify our contention that Operation Rescue activities are not morally offensive we will employ two different methods of analysis, hoping that the concurrence of the two will provide sufficient evidence for our conclusion. The methods will be those of the intuitionist moral philosophers (particularly W.D. Ross and H.A. Prichard)[12] and of the rationalists (Immanuel Kant and Alan Gewirth).[13] While it is not certain that these

---

that the assumption can be defended though we do not intend to offer a defense of it here. *See generally* Reid, *Essays on the Active Powers*, in 3 WORKS OF THOMAS REID 154-72 (Duyckinck, Collins, Hannay & Bartow rev. ed. 1822).

10. *See, e.g.*, W. ROSS, THE RIGHT AND THE GOOD 72-73 (1930). *See also* J. SMART & B. WILLIAMS, *supra* note 5, at 96-7. Williams' example of Jim and Pedro the jungle despot (Jim must choose between killing one child himself or watch as Pedro kills fifty) is an example in which the action which minimizes harm is too offensive to be entertained.

11. For example, a person with high self-esteem may not be harmed by an insult, but the insult is offensive even though not productive of harm.

12. W. ROSS, *supra* note 10, at 1-15; Prichard, *Does Moral Philosophy Rest on a Mistake?*, 21 MIND 487 (1912). While they would certainly differ with Prichard and Ross concerning moral ontology (what it is for an action to be wrong), eighteenth century Moral Sense philosophers such as Hutcheson and Reid represent a very similar strategy with regards to moral epistemology (what it is to know and how it is that we come to know whether an action is right or wrong).

13. I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (Macmillan rev. ed. 1959); A. GEWIRTH, REASON AND MORALITY (1978). The Rationalist camp has many other members, including Plato and John Locke. Kant and Gewirth will be focused upon because of the central place they give to universalizability as a requirement for true moral judgments. *See also* R. HARE, FREEDOM AND REASON (1963); Baier, *Moral Reasons*, in MIDWEST STUDIES IN PHILOSOPHY 62 (1978); and S. DARWALL, IMPARTIAL REASON (1983).

philosophers would agree with our conclusion, we do think that their methods can be fairly and consistently marshalled to substantiate our thesis. The Intuitionist analysis relies on the claim that in considering an action humans are directly "struck" by moral characteristics involved in it. These direct "perceptions" regard "*prima facie*"[14] rights and duties involved in the action. For example, we all acknowledge a *prima facie* duty to keep promises, i.e. we are aware of strong reasons to act so as to keep the promise. If an action involves the violation of a promise, such an action is *prima facie* wrong. If no other rights or duties are involved, then the action is wrong *simpliciter*.

The difficult cases are when more than one right or duty is involved (as with Operation Rescue activities). In these cases a judgment must be made as to which of the various *prima facie* concerns is of overriding importance. Both Ross and Prichard would assert that in such situations, although the matter may require carefully considering the details of the case, one of the *prima facie* rights will take precedence over the other. In complex cases, there is often disagreement about whether an action is offensive; this is usually because people differ about which of the various legitimate concerns should take precedence.

Usually the judgment that an action is offensive is made without reflection: people see or contemplate an action and then respond. People are capable, however, of amending their appraisal after the fact as a result of reflection. As we will discuss below,[15] the most crucial element in the initial reaction-judgment is the description under which the action is judged. If, after reflection, it is clear that the overriding right has been violated, then there is sufficient reason to believe that the action is morally wrong. We contend that, under the appropriate description, Operation Rescue activities uphold rather than violate the most important rights involved in the Operation Rescue context.

The rationalist strategy which we employ assumes that an action is morally right (in the absence of laws to the contrary) only if the principle upon which the action is based can be universalized. For example, suppose you are contemplating slandering an associate because she stands in the way of your own advancement. In spreading the lies you would be acting on the principle (Kant would call it a "maxim") "I ought to slander my

14. Darwall uses "presumptively" to mean essentially the same thing. S. DARWALL, *supra* note 13, at 86.

15. *See infra* at 1035-36.

associates when it enhances my chance for advancement." The universalized form of this principle would be "Everyone ought to slander all those who threaten their chances for advancement."

Rationalists insist that you should see that such an action must be morally wrong either because you would not be willing that everyone else should act on that principle (since this means that others would be slandering you for their own benefit) or because a world in which everyone slandered everyone in their way would be a world in which no one would trust anyone else and there would be no such thing as advancement at all.[16] Ultimately all of these rationalist strategies (commonly referred to as "universalizability tests") depend on looking hard at the situation with a particular question in mind ("What is the overriding consideration here?" or "Is the principle on which the action is based universalizable?") and having the answer strike you with some sort of intuitive force.

In many cases, an action may offend our moral sensibilities simply because we know it to be a violation of existing law. To a certain extent, when someone breaks the law we are offended by the disrespect which such behavior shows for the wisdom of those who made the laws; or because the actor is asserting that the law need not apply to herself; or because the action is seen as an attack on the stability of society. Whatever the reason, we are uneasy with disrespect for the law, and in the absence of reason to believe otherwise, willful violation of the law exhibits this sort of disrespect.

There are, however, circumstances in which our propensity to be offended by such actions is at least suspended, for example, if we are aware that the actor is driven by extreme need. Another example is when the action is performed to influence a change in the law itself. In either of these cases, the violation of the law is not usually considered offensive *as an*

16. In a very simplified form this is the method common to both Kant and Gewirth. The primary formulation of Kant's Categorical Imperative is crucial to the conclusion in this example: Act only on that maxim which can at the same time be willed as a universal law. I. KANT, *supra* note 13, at 39. Gewirth's Principle of Generic Consistency (the supreme principle of morality) commands that everyone "Act in accords with the generic rights (freedom and well-being) of your recipients as well as yourself." The basic point is that we are rationally obliged to promote and not impede the voluntary and purposive activity of others. A. GEWIRTH, *supra* note 13, at 135-50.

instance of law-breaking.[17] If it is found to be offensive, it will be for other reasons.

Frequently Operation Rescue activities are defended as actions in violation of the law, but justifiable because of the need which another (the fetus) has for protection. For those not convinced that there is another interested party in the case, this is not a sufficient reason to suspend judgment. Despite that, Operation Rescue activities can still be defended as instances of civil disobedience. If it can be shown that Operation Rescue activities constitute morally justifiable acts of civil disobedience, then those offended by such activities primarily as violations of law should have sufficient reason to reconsider their appraisal.

B. *Concerning Civil Disobedience*

In order to consider Operation Rescue activities as instances of civil disobedience it is first necessary to give a general definition of civil disobedience, outlining the characteristics which an action must have in order to qualify as civil disobedience. In his discussion on civil disobedience, John Rawls provides a helpful summary of some essential characteristics:

> a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.[18]

According to this definition, there are five characteristics which an action should possess if it is to be regarded as civil disobedi-

---

17. When people break the law *as part of*, and *for the purpose of* changing the law, whether or not we are offended by the action is not a function of our reaction to the act as an act of lawlessness. Rather, it is a function of our agreement or disagreement with them in their purpose to change the law. If we sympathize, and the lawlessness is proportionate to the message, then we will react to the action as an instance of message delivery. If we do not sympathize, then we may be offended even by proportionate disobedience—but it will be offense at both the message and the act *as* message delivery.

18. J. RAWLS, A THEORY OF JUSTICE 364 (1971). Rawls' definition was chosen for this discussion because his account of civil disobedience is one of the least permissive accounts available and thus provides a stern test. We are assuming that actions that conform to his definition would be admitted easily by others' definitions. For example, the model proposed by Dworkin is particularly permissive. *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY 184-96 (1977) (arguing that citizens have a right to exercise "fundamental rights" in accord with their consciences even in ways contrary to legislative mandate). The models proposed by Martin Luther King, Jr. and Gandhi are similarly more permissive than Rawls'.

ence (as opposed to conscientious refusal[19] or militant defiance).[20] First, the action must violate an existing statute or legal rule. Second, the action must be performed at least partially with the purpose of altering existing laws or policies.[21] (The law violated by the action need not be the law or policy the action intends to affect. We will refer to these two laws as the "violated law " and the "targeted law.") Third, the actions must be accompanied by some attempt to explain the purpose of the actions to those capable of affecting a change in the existing laws or policies.[22] Fourth, the action must be nonviolent, such that no actual threat to the physical safety of others is essential to the action. Finally, the action must be undertaken "within the limits of fidelity to law . . . [and with] the willingness to accept the legal consequences of [the action]."[23]

These features are highlighted for two reasons. First, we are concerned to emphasize that Operation Rescue activities constitute genuine instances of civil disobedience rather than being instances of militant defiance. To the extent they do not deviate from their stated policies, Operation Rescue activities meet all of these requirements. Second, breaking the definition down in this fashion facilitates our consideration of the extent to which the law ought to change as a result of such activities.

The change in law advocated in this note is not a change in the law that Operation Rescue activists are seeking to effect as a result of their activity (indeed, effecting a change in law is not their primary purpose).[24] Moreover, it is not our intention to

19. An example of conscientious refusal would be omitting a required action, such as refusing to pay income taxes because the money may be used to support a war.

20. An example of militant defiance would be blocking the entrance to a government building and actively preventing people from entering.

21. The action need not have affecting an alteration in law as its primary purpose. Those who protested racial segregation policies by using restricted washroom facilities did not serve only the purpose of suggesting change by their activities.

22. Since Rawls crafts his definition only for the case of a democracy, this characteristic is expressed by his inclusion of "public" in the definition. The assumption is that the action must be performed with the majority as the audience, those empowered to effect an alteration. *See* J. RAWLS, *supra* note 18.

23. This is part of Rawls' gloss on the "nonviolent, conscientious" requirement in the definition. *See* J. RAWLS, *supra* note 18, at 366.

24. One of the primary purposes of Operation Rescue is to dissuade pregnant women from having an abortion. The proposal we are advocating here calls for a qualification on the prohibition against trespass in order to facilitate the efforts of people who wish to provide information necessary for the making of a fully informed choice.

argue that Operation Rescue activities are in fact morally permissible in spite of the fact that the law presently forbids it. Rather, it is our contention that *if* there were no law forbidding their use of private property in the way they do, *then* there would be no grounds upon which to find their actions morally impermissible.[25]

In the preceding section we indicated that laws of prohibition for matters not purely regarding expedience must have a foundation either in the harmfulness or the moral offensiveness of the actions being forbidden. With these two possible foundations in mind it is possible to distinguish "justifiable" civil disobedience from that which is "unjustifiable." "Justifiable" instances of civil disobedience are those which satisfy the five requirements detailed above,[26] as long as the violated law, in being applied to the actions involved, forbids actions which are neither harmful nor morally offensive. Many of the activities associated with the civil rights movement of the 1960s qualified as "justifiable" civil disobedience according to this definition. In the case of those which made non-violent use of racially restricted facilities, the violated law and the targeted law happened to coincide. What made the activities inoffensive was not primarily the fact that the targeted law lacked moral foundation, but rather the fact that the *violated* law lacked such a foundation. If it had been the lack of foundation of the targeted law which made the actions inoffensive, then many other laws could have been violated to convey their message, and the disobedience would still have qualified as "justifiable." For example, if activists had attempted to change laws which restricted the use of drinking fountains by destroying the fountains set aside for whites only, the groundlessness of the laws providing the restrictions would not have been sufficient to justify the acts of destruction.

When the violated law lacks appropriate foundation (i.e. in "justifiable" civil disobedience) some change in the law is justified. This change can take one of two forms, depending on the extent of the defect in the law. If the law is based on a mistaken understanding of the rights of individuals (as with laws regarding racial segregation), then the law should be abandoned. This is not what is at issue regarding the violated statute in Operation Rescue civil disobedience.

---

25. This part of the thesis is qualified because it is not necessary to argue for any more than this regarding the moral acceptability of the proposal itself.

26. *See supra* at 1002.

Although a statute may not be based on a mistaken premise, it may also be defective by being excessively general, and thereby extend prohibitions beyond the justifying foundation of the more general statute. Laws with this defect need to be amended rather than abandoned. It is our contention that laws concerning criminal trespass possess this defect and that for this reason an amendment is necessary. This is not a particularly radical suggestion. Laws are frequently amended precisely because their original formulations need to be general and cannot normally address each of the unusual situations which will stretch the limits of their generality. Moreover, as we will discuss below, laws concerning criminal trespass should themselves be qualified, particularly with regard to the nature of the trespass involved in the Operation Rescue context.[27]

While it is true that in the Operation Rescue context the violated statute and the targeted statute do not coincide, it is important not to allow convictions about the justifiability of the targeted statute (laws concerning access to an abortion) to cloud the issue. At issue is the foundation for the violated statute, the specific application of the criminal trespass laws to the actions of Operation Rescue participants, not as Operation Rescue participants *per se*, but more generically construed, i.e. as providers of significant information regarding a health care choice. Although we do not attempt to consider this case apart from claims highly specific to the Operation Rescue context, this context provides only the occasion for our analysis of the criminal trespass statute.[28]

C. *Concerning Rights Relating to Informed Choice*

Before looking at the complications which the Operation Rescue context provides to the substance of the analysis, it is important to reflect on the high priority that ought to be given to the right to make informed moral choices. Rational beings possess the ability to make choices between genuine alternatives; they can weigh the reasons for and against a particular course of action and act upon what they perceive to be the weightier reasons. This ability is so central to the conception of free and responsible choice that if a choice is made in the absence of reflection on reasons for alternatives there is reason to be reluctant to call it a choice for which the actor was

27. *See infra* at 1011-12.

28. This being the case, the proposed change in the trespass laws could be applied to benefit labor unions, Communists or members of the Ku Klux Klan, provided they met the criteria of the proposal.

"responsible." For example, if a driver swerves to miss a ball that is thrown into the road and plows over a row of mailboxes it is ordinarily wrong to say that she *chose* to destroy the mailboxes. In addition to reflection, however, responsible choice involves at least some knowledge concerning the reasons for the alternatives: an uninformed choice is not a responsible choice either.

A certain amount of caution is necessary here, however, since the word "responsible" in this context can have two different meanings. First, "responsible" can mean "involving accountability," in which case choices are either "responsible" or they are not. A choice made by a person in a psychotic state would be irresponsible in this sense. Second, "responsible" can mean "faithfully fulfills obligations." Some choices can be "responsible" in the former sense without being "responsible" in the latter. When our parents told us to act responsibly they did not intend that we merely act on the basis of just any information; they more likely intended that we act on the information (for the reasons) which they taught us to consider significant. To avoid this potential ambiguity, we will use "responsible" in the first sense, and use "commendable" for the second. Commendable actions, in this sense, are those actions which are based on a thorough consideration of the various reasons the actor might have had for and against performing it. Thoroughness in this context is not simple to define, and will depend upon how much time the actor has to consider options and the extent of the actor's knowledge of the options. Choices made while purposefully refusing to consider relevant factors cannot be regarded as commendable actions.

With this distinction in mind, our next step will be to demonstrate that moral agents have an obligation to make choices which are as commendable as is reasonably possible (when a choice is required). Moreover, this obligation on the part of the chooser implies that others have both a right, and, in some situations, an obligation to assist the chooser (without violating the chooser's freedom in choosing) when making a commendable choice. Alan Gewirth's analysis of rational agency is helpful for establishing this claim, and it runs as follows:[29] rational agency is impossible unless the agent possesses two characteristics: voluntariness and well-being.

29. *See generally* A. GEWIRTH, *supra* note 13, at 58-63 (The heart of his argument is that these provisions must be rights for everyone, because if they are not, moral agency is not possible for anyone. Since moral agency is evidently possible, these must be rights.)

Because of this, Gewirth concludes the following: first, that the agent has a *right* to have the conditions of voluntariness preserved and where possible augmented;[30] second, this right implies that others have a moral obligation to safeguard and where possible augment the conditions of the agent's voluntariness; and third, everyone ought to safeguard and where possible augment the conditions of any agent's voluntariness.

As a consequence of this third conclusion, it can be derived that the agent herself has an obligation to safeguard, and where possible augment, the conditions of her own agency. Thus, every agent has an obligation to make a choice which is *as commendable as is reasonably possible* when a choice is required.[31]

Since the absence of knowledge of considerations relevant to a choice is sufficient to render a choice significantly *in*voluntary, it is evident that one of the conditions of voluntariness is the possession of at least some knowledge of the relevant considerations.[32] Furthermore, any increase in the agent's knowledge of relevant considerations contributes to an increase in the conditions of voluntariness for the agent. Consequently, both the agent and others in a position to assist her have an obligation to seek to increase the relevant information which the agent possesses regarding the choice.

Consider the following example: Smith and Jones are alone in the Chemistry lab eating lunch. Smith wants to put salt on his sandwich, but he doesn't have any. Smith's knowledge of Chemistry extends far enough for him to know that salt is composed of sodium and chloride, and seeing bottles of each available he figures that mixing them will produce salt.[33] Jones sees what Smith is about to do, and realizes the potentially

30. It also implies a right to well-being, but since that feature of the agent is not essential to our argument we will not make mention of it along with voluntariness. It should, however, be assumed.

31. While this may appear to be an excessively perfectionist implication, it is important to stress that since we have at least *some* obligation to be careful in making choices, it is reasonable to say that we have an obligation to make the choice as commendable as time and resources allow. For example, it is a failure to make choices based on what you know to be unfair prejudices or unreliable information.

32. "Relevant consideration" is a bit hard to define precisely in this context, but we are assuming that relevant considerations are all those that *could* motivate the agent to make a particular choice. This definition is very similar to what Stephen Darwall would call "reasons for a person to act." *See* S. DARWALL, *supra* note 13, at 78-82.

33. Simply mixing sodium and chloride, however, will not produce salt. Rather, the sodium would combust when swallowed, and have a potentially lethal effect if ingested in this manner.

deadly consequences of swallowing such a mixture. Does Jones have any obligation to assist Smith with information relevant to what Smith is about to do? Although Jones could probably not be held legally responsible[34] if he does nothing, the fact remains that so long as Jones can do something to warn Smith at little cost to himself, Jones would be quite lacking in concern for the well-being of Smith not to make some attempt. Both lacking normal human sympathy for others and acting as if one lacked such sympathy are moral failures.[35] Failing to assist Smith at little cost to himself would be a moral failure on Jones' part.

It should be noted that Jones' obligation in this matter amounts only to his *attempting* to give Smith the necessary information. If Jones tells Smith to stop and listen for a moment and Smith pulls his hat over his head, then Jones will have fulfilled his obligation (at least regarding information). Thus, the general obligation on the part of others is to safeguard and attempt to augment the conditions of others' agency; while for the agent the obligation is to safeguard and augment the conditions of agency. If it is granted that obligations imply rights,[36] then Jones has the right, as well as the obligation, to attempt such assistance.

The illustration with Smith and Jones can further be used to indicate factors which bear on the urgency of the obligation (and therefore the defeasibility of the right). Three factors are particularly significant. First, the urgency of the obligation to assist with information is greater to the extent that Jones (the "informer") has reason to believe that Smith (the agent) *lacks* the information. Second, the urgency of the obligation on the informer is greater to the extent that the informer has reason to believe that the agent would find the information relevant to the choice. In the illustration these two are closely tied together, but it is possible that only one of the two factors would come into play.

The third factor that bears on the urgency of the obligation on the informer is the proximity of the agent to the moment of actually completing the process of deliberation.

---

34. *See* Jones v. United States, 308 F.2d 307 (1962).

35. *See, e.g.*, F. HUTCHESON, ILLUSTRATIONS ON THE MORAL SENSE (1971); D. HUME, ENQUIRY CONCERNING THE PRINCIPLES OF MORALS (Schneewind rev. ed. 1983).

36. The relationship between duties and rights is a morass all its own into which we do not wish to wander at this point. *See generally* W. ROSS, *supra* note 10, at 48-55 (defending the move from an obligation which implies rights to a correlative right).

The urgency is greater the closer the agent is to this "moment of truth." The process of deliberation about a course of action begins with the awareness that a choice is required and ends with an action *beyond which an alternate choice is impossible.* With some choices this point is easier to identify than with others. Usually, however, it is possible to determine whether a particular process of deliberation is still incomplete. The relevant issue is whether it is still possible for the agent to choose more than one alternative course of action. In the criminal law context, this is what is known as the "locus poenitentiae," or the "chance afforded to a person, by the circumstances, of relinquishing the intention which he has formed to commit a crime, before the perpetration thereof."[37]

Since it is possible to form an intention to choose one of a number of alternatives without having the process of deliberation end with that as the choice, there is a discernible difference between the formation of an intention to act and the final choice in the matter. We will refer to this interval between intention formation and completion of the choice as the "extremity" of the process of deliberation. It should be noted that the obligations to augment the conditions of agency are still in force up to the completion of the choice in the final act, and thus the fact that the agent has formed an intention about a choice does not release either the agent or the informers from their obligations concerning information relevant to the choice. In fact, the obligation, especially on the informer, is most urgent when the agent is in the extremity of the process of deliberation.

D. *Concerning the Intended Character of Operation Rescue*

Operation Rescue, although essentially a confederation of various pro-life organizations,[38] refers to itself in its literature as an "event" rather than an organization.[39] Coordinated nationally by Randall A. Terry, the founder and executive director of Project Life, Operation Rescue advocates a series of sit-in "rescues" organized under a common vision which regards their actions as "intervening on behalf of the baby and the mother."[40] By "mother," Operation Rescue advocates are referring to pregnant women approaching abortion clinics to

37. BLACK'S LAW DICTIONARY 1090 (4th ed. 1951).

38. *See Join Us In Operation Rescue* 5 (1988) (pamphlet stating the official policy and practice of Operation Rescue) [hereinafter *Join Us*].

39. *Id.* at 1.

40. *The New American*, Nov. 7, 1988, at 19.

get an abortion, and the "baby" refers to the fetus she is carrying.

Terry indicates the short-term goal of Operation Rescue as stopping as many abortions as a direct result of the "rescues" as possible, and the long-term goal as being a constitutional amendment prohibiting abortion.[41] Additionally, Operation Rescue literature identifies goals of "changing public opinion to prevent abortion," creating a "wave of righteous uprising," and "obeying God's command."[42]

Operation Rescue coordinators recognize the importance of having the events be "unified, peaceful, and free of any actions or words that would appear violent or hateful to those watching on T.V. or reading about it in the paper."[43] To this end the activists are required to read and pledge in writing to abide by explicit rules for on-site participation.[44] In general, the rules require participants to "co-operate with the spirit and goals of the event," "commit to be peaceful and non-violent in word and deed," ". . . not struggle with police in any way, but remain polite and passively limp," and let "appointed individuals" do the talking with media, police, and women seeking abortion while "singing and praying with the main group."[45]

It is further important to note what is *not approved* by Operation Rescue. Pledging "non-violence in word and deed" would negate any endorsement of assault on people or destruction of property including blatant violations of the pledge such as bombing abortion facilities or attacking doctors. To the extent these things do happen, Operation Rescue does not "take responsibility or inwardly rejoice."[46] For the purposes of this article, the practices of Operation Rescue will be evaluated as they are ideally conceived. Specifically, "non-violence" will be recognized as the absence of any physical damage to persons or property. The proper means of bringing this about are best illustrated in the words of an Operation Rescue advocate as "preventing the death of babies by fully informing the mothers of the consequences of the abortion."

---

41. *Id.* at 20.
42. *See Join Us, supra* note 38, at 2.
43. *Id.* at 4.
44. *Id.*
45. *Id.*
46. *Id.* at 5.

III. PROPOSED AMENDMENT TO CRIMINAL TRESPASS STATUTES

From state to state there is little variation in the language and effect of the general laws against criminal trespass. For purposes of this article the statute targeted for amendment will be the Model Penal Code section 221.2,[47] appropriately titled "Criminal Trespass." While the Model Penal Code prescribes no specific penalty, the penalty for violation of the Indiana law against criminal trespass is typical of the penalty in other jurisdictions: a class A misdemeanor carrying a sentence of a maximum of one year in jail, a $5,000 fine, or both.[48]

We propose that states retain the language of their current criminal trespass statutes with the following amendment:

The Criminal Trespass statute is not violated if:

1) no physical contact with unconsenting persons is initiated,
2) no physical damage to property is involved,
3) the property is
   a) a health care facility, and
   b) publicly accessible,
4) the otherwise unprivileged entry does not
   a) go beyond the entrance into the facility, and

---

47. Criminal Trespass:

(1) Criminal Trespass Defined. A person is guilty of criminal trespass if, without privilege to do so, he purposely enters or remains in:

(a) any building or occupied structure, or separately secured structure or any portion thereof; or

(b) any other place as to which notice against trespass is given. Notice may be given by posting in a manner proscribed by law or reasonably likely to come to the attention of intruders, as well as by actual communication to the actor.

(2) Grading. Criminal trespass is a violation, except that it constitutes a petty misdemeanor if:

(a) the actor breaks into any building or occupied structure, or separately secured or occupied portion thereof, or

(b) the intrusion is in a building or occupied structure and the intruder knows that discovery of his presence would under the circumstances cause apprehension for the safety of person or property.

"Break into" means to enter by force, intimidation, deception, or trick, or by any unauthorized use of a pass key or any device for intruding in secured premises, or through an opening not designed for human access.

48. IND. CODE § 35-50-3-2 (1988).

Class A misdemeanor. A person who commits a class A misdemeanor shall be imprisoned for a fixed term of not more than one (1) year; in addition, he may be fined not more than five thousand dollars ($5,000).

b) occur during any time when the facility is closed to the general public,

5) the activity on the property bears upon a practical health choice which
   a) is manifestly in its extremity, and
   b) involves the provision of information necessary for a fully commendable completion of the choice, and
6) the information provided is reasonably believed not to be in the possession of the person making the choice.

Definitions:

1) A "practical health choice" is the voluntary selection of a course of action intended to directly affect the physical or psychological well-being of the person making the choice.
2) A practical health choice is "manifestly in its extremity" when there is convincing evidence that the person has formed the intention to act in a particular manner but has not yet physically brought the intention to completion.
3) A "fully commendable practical health choice" is one in which the person, upon careful reflection, is unaware of prejudice or partiality; and one in which the person has made a good faith effort to seek out and not to ignore information potentially related to the facts of the situation, the options involved, and the likely consequences of those options.
4) Information is "essential to a fully commendable practical health choice" if it concerns either the facts of the situation facing the person making the choice, or the options available, or the likely consequences of those options.

While this particular amendment may intrude upon the rights of certain parties, such intrusion does not offend the federal Constitution. Furthermore, by decriminalizing only nonviolent activity which provides needed information, the amendment facilitates the often stated government objective of making consumers aware of the implications of their decisions. Finally, this narrow qualification on the absolute prohibition against trespass provides for more good than potential harm, and does not offend common sensibilities in a democratic society.

IV. JUSTIFICATION OF THE PROPOSAL

A. *The Proposal Is Reasonable and Constitutional*

The amendment to state criminal trespass statutes proposed in section III[49] raises a number of constitutional issues, particularly as applied to Operation Rescue activities in front of abortion clinics. Operation Rescue participants' rights to free speech, clinic owners' due process and property rights, and womens' rights to choose an abortion are all constitutionally protected to a certain degree. In determining whether the proposal is constitutionally valid and judicially prudent, each of these rights must be examined and balanced[50] in relation to each other. Additionally, because only a state's *criminal* laws are affected, it is particularly important to determine whether the public's interest in protection through criminal laws implicates constitutionally protected rights.

1. No Private Constitutional Interest in Criminal Laws

The proposal puts a narrow range of trespass activity beyond the state's authority to impose criminal sanctions. A person wishing to challenge the constitutionality of such an amendment would most likely allege a violation of a constitutional right, and seek a remedy under section 1983 of the Civil Rights Act of 1871.[51] To come within the provisions of section 1983, a person (in this case, either the clinic owner or pregnant woman) would claim that the state, as *parens patriae*, failed to protect either the property or the right to choose an abortion, thus causing a deprivation of "life, liberty, or property, without due process of law."[52] In general, however, federal courts have

---

49. Hereinafter referred to as "the proposal."

50. *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980), discussed *infra* at 1016-17; Freedman, *Press Passes and Trespasses: Newsgathering on Private Property*, 84 COLUM. L. REV. 1298, 1305, 1334-42 (1984). Both suggest that when rights of free expression interfere with the rights of others, the interests of parties affected should be balanced rather than denying free expression altogether.

51. 42 U.S.C. § 1983 (1982). The statute states in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution, shall be liable to the party injured . . . ."

52. U.S. CONST., amend. XIV, § 1 (the Due Process Clause), *applied in* Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).

been reluctant to recognize a due process right to protection by the state.[53]

The leading Supreme Court case regarding state protection as a due process right is *DeShaney v. Winnebago County Department of Social Services*.[54] In *DeShaney*, the Court stated at the outset of the opinion that the Due Process Clause

> forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means . . . . Its purpose was to protect the people from the state, not to ensure that the state protected them from each other.[55]

The majority further emphasized that the due process clause does not entitle private citizens to governmental assistance, "even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual."[56]

Prior to *DeShaney*, the Supreme Court had avoided ruling explicitly that there was a due process right to protection through criminal laws, but nevertheless excluded sources of state liability in cases alleging a constitutional violation under section 1983.[57] Federal circuit courts, however, have specifically refused to recognize protection by the state through its criminal laws as a constitutional right.

In *Bowers v. DeVito*,[58] for example, the Seventh Circuit dismissed the section 1983 claim of a woman killed by a person known by state officials to be dangerous. Judge Posner, writing for the majority, held that the state was not constitutionally obliged to protect citizens from private violence, stating that "[t]he Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal govern-

---

53. *See, e.g.*, Estate of Gilmore v. Buckley, 787 F.2d 714, 720-23 (1st Cir. 1986); Washington v. District of Columbia, 802 F.2d 1478, 1481-82 (D.C. Cir. 1986); Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982); DeShaney v. Winnebago County Department of Social Services, 109 S. Ct. 998 (1989).

54. 109 S. Ct. 998 (1989).

55. *Id.* at 1003.

56. *Id.* (citing Harris v. McRae, 448 U.S. 297, 317-18 (1980) (no obligation to fund abortions or other medical services)); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (no obligation to provide adequate housing).

57. *See, e.g.*, Martinez v. California, 444 U.S. 277 (1980); Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1986).

58. 686 F.2d 616 (7th Cir. 1982).

ment or the state to provide services, even so elementary as maintaining law and order."[59]

The plaintiffs in *Bowers* and *DeShaney* based their section 1983 claims on the premise that the state has a constitutional obligation to use its police power to criminally sanction certain behavior and protect citizens from danger. The *Bowers* Court clearly rejected this premise in stating:

> [T]here is no constitutional right to be protected by the state against being murdered by criminals or madmen. It is monstrous if the state fails to protect its residents against such predators, but it does not violate the due process clause of the Fourteenth Amendment or we suppose, any other provision of the Constitution.[60]

Bowers and *DeShaney* involved what appeared at first glance to be a state's deprivation of life without due process of law. It would indeed be "monstrous," as Judge Posner states in *Bowers*, for a state to withhold its police power to deny protection against murderers. Nevertheless, to do so would not offend the Constitution.

The proposal similarly appears to be a state deprivation. Rather than involving an apparent deprivation of life, the proposal affects property by affording less state protection to property owners when their property is imposed upon in a particular way. However, for the same reasons stated in *Bowers* and *DeShaney*, the proposal's narrow qualification on laws against criminal trespass does not rise to the level of a constitutional violation.

Rather than withholding protection from murderers, the proposal would merely deprive the state of authorization to prosecute non-violent trespassers engaged in a narrowly-defined activity on limited portions of private property. Since only criminal trespass is affected, civil trespass remedies would remain. In this regard, the proposal is far less "monstrous" than the scenario envisioned by Judge Posner in *Bowers*, and furthermore serves to enhance freedom of expression.

2. Proposal Implicates a Clash of Constitutional Claims

When Operation Rescue participants assemble at an abortion clinic, several constitutional values are implicated. By voicing their opposition to the policy of legalized abortion and informing women about negative consequences of, and possi-

59. *Id.* at 618.
60. *Id.*

ble alternatives to, undergoing the procedure, the Operation Rescue participants exercise their first amendment right to free speech.[61] Besides free speech rights, the proposal may implicate other constitutional interests, such as a woman's right to choose an abortion,[62] the clinic owners' right under the fifth amendment to be free from having his property taken without just compensation,[63] and the right of both these parties to "be let alone."[64] The clash between the Operation Rescue participants' free speech interests and these other claims, however, suggests that a narrowly limited privilege to trespass be created, rather than allowing for no privilege at all.[65]

a. Free Speech Versus Privacy, Due Process and Freedom From Uncompensated Takings

By removing criminal penalties from a specific range of trespass activity, the proposal would effectively permit the limited use of private property without the owner's consent. Such use would be confined to expressive activity by Operation Rescue participants or any other person meeting the criteria of the proposal, thus promoting free speech. Whether this constitutes a "taking" of the clinic owners' property in violation of the fifth amendment was answered in the negative by a unanimous Supreme Court in *Pruneyard Shopping Center v. Robins*.[66] In addition to the "takings" issue, the Court in *Pruneyard* affirmed that a state could permit, in some circumstances, the unconsented use of private property without violating the due pro-

61. U.S. CONST. amend. I. This provision states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ." This guarantee also applies to the states as incorporated by the Due Process Clause of the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925).

62. Roe v. Wade, 410 U.S. 113, 153 (1973).

63. U.S. CONST. amend. V. This provision states in pertinent part: "[N]or shall private property by taken for public use without just compensation . . . ." This guarantee applies to the states through the Due Process Clause of the Fourteenth Amendment. Chicago B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).

64. Rowan v. U.S. Post Office Dept., 397 U.S. 728, 736 (1970) (referring to Justice Brandeis' dissenting opinion in Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

65. *See, e.g.*, Commonwealth v. Tate, 432 A.2d 1382 (Pa. 1980) (Court balanced interests of demonstrators with interests of property owners to decide that certain speech, within limits, was protected on some private property under state constitution); Freedman, *supra* note 50, at 1328-42 (arguing in favor of a newsgathering privilege on private property based on a balancing of the interests involved).

66. 447 U.S. 74, 78 (1980).

cess clause of the fourteenth amendment.[67] Furthermore, while Justice Powell's concurrence in *Pruneyard* suggested that permitting the same activity on private *residential* property might be an unconstitutional intrusion into personal privacy,[68] such an exception would not invalidate the proposal.

1) *Fifth Amendment Considerations.* In *Pruneyard,* the Court noted that the right of a property owner to exclude others is one of the "sticks" in the "bundle of property rights," and that limiting that right through state regulation technically amounted to a "taking" of that right.[69] Nevertheless, the Court went on to rule that not every government action limiting property rights constitutes a "taking" in violation of the Constitution.[70] The Court established a balancing test in holding that a state's limitation on the right to exclude would constitute a "taking" only when it is sufficiently "essential to the use or economic value of their property . . . ."[71]

Whether a state's restriction on the right to exclude impairs the economic value substantially enough to be a "taking" will frequently depend on whether the restriction is temporary or permanent. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court held that a law authorizing a permanent physical occupation of property, how-

---

67. *Id.*

68. 447 U.S. at 100 n.4 (Powell, J. concurring).

69. Rather than phrasing the guarantee of free speech as a right the state may not abridge, the California Constitution uses language providing affirmative rights to free speech. The California Supreme Court, in Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854, *aff'd* 447 U.S. 74 (1980), held that this state guarantee of free expression exceeded the protection of the federal Constitution, and granted persons the right to use privately-owned shopping centers for non-disruptive speech activities. The U.S. Supreme Court affirmed that California was free to adopt statutes or constitutions granting individual liberties more expansive than the federal Constitution. 447 U.S. at 81.

As precedent, *Pruneyard* would be highly persuasive as authority to limit property rights in favor of free speech rights in the forty-four states where free speech guarantees in the state constitutions are linguistically similar to California's in that affirmative freedoms are granted. *See* Meyer, *Assuring Freedom of the Student Press After Hazelwood*, 24 VAL. U.L. REV. 53, 71 n.113 (1989), for a complete list of these forty-four state constitutional provisions.

70. 447 U.S. at 82.

71. *Id.* at 84. The plaintiff, the owner of a shopping center, alleged that since the California Constitution permitted a group of students to use the property to gather signatures for a petition, there was necessarily a "taking" of his right to exclude. The Court, however, noted that the presence of the students only marginally interfered with the commercial function of the shopping center, and so the right to exclude them did not have a significant economic value. *Id.* at 83.

ever slight, constituted a *per se* taking.[72] Conversely, the *Loretto* Court also stated that the validity of temporary physical occupations would be determined by a balancing of the parties' interests.[73]

An example of a temporary restriction, particularly analogous to the proposal, is illustrated in *State v. Shack*.[74] In *Shack*, the New Jersey Supreme Court reversed the criminal trespass convictions of a social worker and an attorney who had entered a migrant worker camp, without the owner's consent to give legal advice and provide health services. The Court first conceded that the farmer-employer was entitled to pursue his farming activities without interference.[75] Nevertheless, this right could not be extended to allow the farmer to deny the workers the opportunity to receive aid and information available from groups seeking to assist them.[76] The *Shack* Court further noted that due to the "disadvantaged" state of the migrant workers, their need for legal and health services was much greater than the mainstream of the community.[77] Consequently, it would be inappropriate to punish efforts to reach them.

2) *Fourteenth Amendment Considerations*. In addition to the fifth amendment, property owners are protected by the due process clause of the fourteenth amendment.[78] In *Pruneyard*, a shopping center owner alleged that state laws permitting private persons to use his property for expressive activity violated the due process clause.[79] In rejecting this argument, the Court stated that the fourteenth amendment requires only that the law "not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be obtained."[80]

The proposal grants an avenue for affirmative free speech rights as the means for meeting the objective. The objective—to provide information necessary for making fully commendable health choices—relates directly to the means by decriminal-

72. 458 U.S. 419, 432-35 (1982).
73. *Id.*
74. 58 N.J. 297, 277 A.2d 369 (1971).
75. 58 N.J. at 307, 277 A.2d at 374.
76. *Id.*
77. *Id.* at 303, 277 A.2d at 372.
78. U.S. CONST. amend. XIV. The Due Process Clause provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."
79. 447 U.S. at 84.
80. *Id.* at 85 (quoting Nebbia v. New York, 291 U.S. 502, 525 (1934)).

izing trespass only at places and times where such information is likely to be needed. The reasonableness of the proposal will depend on 1) the extent of a state's obligation to protect private property,[81] and 2) the balance of the interests of the affected parties.[82]

3) *Privacy Considerations.* Finally, property owners may argue that the proposal violates their constitutional privacy rights.[83] The strength of this argument will largely depend on the purpose and accessibility of the property. While several cases have indicated that privacy interests in one's home are substantial enough to override first amendment claims,[84] the holding in *Pruneyard* suggests that private property held open for business to the public involves an expectation of privacy which must yield to state guarantees of free expression.

b. Free Speech Versus Rights to Privacy and a Choice Regarding Abortion

Besides conflicting with property and privacy interests of the clinic owners, the proposal affirms free expression values in a manner which may affect the liberty interests of the clinics' patients and potential patients. In the context of women approaching an abortion clinic in order to terminate a pregnancy, the proposal's effect of facilitating the free expression rights of Operation Rescue participants poses a clash between the speakers' interests and 1) the privacy interests of unwilling listeners,[85] and 2) the right of a woman to choose to terminate her pregnancy free from unjustified state interference.[86] Although the clash in the former instance is normally resolved in favor of the speakers,[87] there are instances when the privacy

81. *See supra* at 1017-18.

82. *See infra* at 1022-27.

83. Although no specific provision of the Constitution affirms a right to privacy, the Supreme Court in Griswold v. Connecticut, 381 U.S. 479 (1965), recognized a general right to privacy within the "penumbra" of rights enumerated in the Constitution.

84. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (right to broadcast offensive speech outweighed by privacy interests in the home); Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (right to broadcast "loud and raucous" noises outweighed by privacy interests).

85. *See Rowan, supra* note 64.

86. Roe v. Wade, 410 U.S. 113 (1973). This right is regarded as a fundamental constitutional right protected by the Due Process Clause of the Fourteenth Amendment. *Id.* at 153.

87. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975) (noting that the burden is ordinarily on the listener to avoid the undesired speech).

interests of an unwilling listener will prevail.[88] In the latter instance, whether the proposal impermissibly infringes on the woman's right to choose depends on two primary considerations: First, does the proposal require the provision of information designed to persuade against exercising the abortion option?[89] Second, does the proposal intrude upon the discretion of the pregnant woman's physician?[90]

1) *Unwilling Listeners.* In protecting unwilling listeners from unwanted speech, courts frequently determine the extent of the privacy interest based on the location of the speaker and listener. Speech which intrudes into a person's home or mailbox can be subjected to regulation.[91] Once a person leaves the safety and tranquility of the home, however, they assume a risk of confronting unwelcome stimuli.

In *P.U.C. v. Pollack*,[92] for example, the Supreme Court upheld the right of the D.C. Metropolitan Transportation Authority to play music and advertisements on public buses, despite the fact that some people found the practice offensive. In *Cohen v. California*,[93] the Court used the same reasoning in overturning a disorderly conduct conviction given to a man wearing a jacket in the county courthouse with "FUCK THE DRAFT" embroidered on the back. In doing so, the argument that the passersby constituted a "captive audience whose sensibilities should be respected" was denied.[94]

As illustrated by *Pollack* and *Cohen*, once a person leaves the home, the burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes."[95] Still, there may be situations where the courts may permit states to protect listeners who are not able to avoid bombardment by unwanted speech.[96] Even in these cases, however, the unwilling listener can only be protected from the

88. *See infra* note 91 and accompanying text.

89. Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 444 (1983).

90. *Id.* at 445.

91. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (regulating the speech broadcast into one's home); Rowan v. U.S. Post Office Dept., 397 U.S. 728, 736 (1970) (regulating speech circulated through the mail).

92. 343 U.S. 451 (1952).

93. 403 U.S. 15 (1971).

94. *Id.* at 21.

95. *Id.*

96. *See, e.g.*, International Society for Krishna Consciousness, Inc. v. Rockford, 585 F.2d 263 (7th Cir. 1978) (protecting the sensibilities of airline passengers in line from religious solicitation).

speech to the extent provided by state law. In order to protect sensibilities and minimize restrictions on free expression, for example, a state may elect to limit a speaker's proximity to a listener in certain areas without prohibiting speech altogether.[97]

2) *Imposition on the Right to Choose.* The Supreme Court held in *Roe v. Wade* that the constitutional right to privacy encompasses "a woman's decision whether or not to terminate her pregnancy."[98] Furthermore, the Constitution requires that the decision remain "free from unjustified government interference."[99] The expressive activity by Operation Rescue participants is designed to affect a woman's decision whether or not to terminate her pregnancy. The critical inquiry, therefore, is to determine if the proposal constitutes unjustified government interference.

In *Planned Parenthood v. Danforth*,[100] the Supreme Court held that a state requirement that a woman certify her consent to an abortion in writing and that such consent be "informed and freely given and not the result of coercion" was not an unjustified state interference.[101] The Court accepted the definition of "informed" as "the giving of information to the patient as to just what would be done and as to its consequences,[102] and further cautioned that "[t]o ascribe more meaning than this might well confine the attending physician to an undesired and uncomfortable straitjacket in the practice of his profession."[103]

---

97. *See, e.g.*, BOULDER, COLO., REV. CODE § 5-3-10 (1981 and Supp. 1987) (Harassment Near Health Care Facilities). The ordinance here limits the distance between a speaker and unconsenting listener to eight feet when within 100 feet of a health care facility.

98. 410 U.S. at 153. Consequently, a woman has "at least an equal right to choose to carry her fetus to term as to choose to abort it." Maher v. Roe, 432 U.S. 464, 472 n.7 (1977).

99. Whalen v. Roe, 429 U.S. 589, 599-600 (1977).

100. 428 U.S. 52 (1976).

101. *Id.* at 65.

102. *Id.* at 67 n.8.

103. *Id.* It is interesting to observe that this cautionary note by the Court tends to restrict the nature of the information given to the woman not based on how it affects her decision, but rather on how it bears upon the *doctor's* discretion. Placing such an emphasis on the doctor's role in the decision, it has been argued, serves to undermine the woman's right as affirmed in *Roe*. This emphasis also opens the door for paternalistic limitations on the woman's right. *See generally* Asaro, *The Judicial Portrayal of the Physician in Abortion and Sterilization Decisions: The Use and Abuse of Medical Discretion*, 6 HARV. WOMEN'S L.J. 51 (1983).

The clearest indication by the Court on the kind of information which will be regarded as an unjustified governmental interference is in *Akron v. Akron Center for Reproductive Health*.[104] In *Akron*, an ordinance required the attending physician to present a woman contemplating abortion with several categories of information.[105] The Court invalidated the requirement for two "equally decisive" reasons.[106] First, rather than providing the basis for a woman to make an informed decision, the Court regarded the ordinance as being designed to "persuade her to withhold [her consent] altogether."[107] Second, the Court expressed concern that the ordinance would be an "intrusion upon the discretion of the pregnant woman's physician."[108]

While *Akron* made clear that a state may not require information calculated to dissuade a woman from choosing in favor of an abortion as a prerequisite to undergoing the procedure, the holding does not suggest that the state must therefore take steps to suppress private parties from making such disclosures. Indeed, state suppression in this regard would almost certainly be invalid as a violation of the first amendment. Essentially, the state's role with regard to the woman's right to choose and the Operation Rescue participants' right to speak freely is that it must maintain a neutral disposition: laws may neither require full disclosure of information relevant to the abortion decision, nor may they forbid it. The validity of the proposal depends on whether it deviates impermissibly beyond absolute neutrality.[109]

3. Balancing of Claims Favors Proposal

The discussion in the preceding subsection illustrates the fact that neither the free speech interests of Operation Rescue

104. 462 U.S. 416 (1983).

105. *Id.* at 442. The ordinance required the physician to disclose information regarding the status of the pregnancy, the development of the fetus, the date of possible viability, the physical and emotional consequences of abortion, and the availability of agencies providing assistance and information on birth control, adoption, and childbirth, as well as the risks associated with her own pregnancy and the abortion technique to be employed. *Id.*

106. *Id.* at 444-45.

107. *Id.* at 444.

108. *Id.* at 445.

109. Based on the Supreme Court's holdings in *Roe*, *Akron*, and H.L. v. Matheson, 450 U.S. 398 (1981), the proposal does not exceed constitutional limitations on a state's ability to affect the woman's right to choose an abortion. *See infra* 1021-22.

participants, nor the property and privacy rights of the clinic owners, nor the women's liberty interests in choosing an abortion are absolute. Accommodating the Operation Rescue participants' freedom of expression through the proposal may well be within a state's authority, and prudence would also dictate that a balance of the interests at stake favor the proposal. Relevant inquiries include the purpose and effect of the trespass, the public accessibility of the health-care facility, the impact on the value of the property, and the extent to which the state interferes with the abortion decision.

a. Purpose and Effect of the Entry

Granting Operation Rescue participants a qualified access to private property is calculated to result in certain benefits to society. The benefits derive from enabling Operation Rescue participants (or anyone else) to provide information detailing the pros and/or cons of abortion (or any practical health choice) to persons so that a decision can be made on a more fully informed basis.[110] Thus, permitting entry must be related to an effort to inform. When the entry impedes the decision-making process, such as an entry to persuade through harassment or intimidation rather than information, the entry cannot be justified. Consequently, the proposal only decriminalizes entry which has the purpose and effect of giving information.[111] Access to private property in order to inform the public is particularly necessary when the targeted audience has limited means of obtaining the information. Courts have upheld such access when the information to be provided was necessary to check potential police abuses of power,[112] and

110. With choices regarding abortion, a full range of information is particularly important. States are forbidden to require disclosures which may dissuade someone from exercising a choice favoring abortion. Consequently, it is reasonable to assume that a substantial number of women contemplating the abortion option are considering much less than a full range of the potential implications. The proposal permits this deficiency to be addressed. *See* text, *infra* at 1028-29.

111. Examples of "harassment" and "intimidation," discussed in *Abortion Clinic Violence: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong. 1st and 2nd Sess. 1, 3, 23, 130 (1987), include chasing patients, screaming threats and epithets, grabbing patients and staff, and shoving signs in the faces of women. While behavior of this nature may include a marginal amount of informative value, it would nevertheless fail to meet the proposal's criteria since the informing aspects are secondary to coercive activity which is not privileged, nor advocated by Operation Rescue. *See generally* Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, 101 HARV. L. REV. 1856 (1988).

112. *See* Richmond Newspapers v. Virginia, 448 U.S. 555, 604 (1980).

make isolated migrant workers aware of their legal rights.[113] In these circumstances, courts have recognized the benefits of allowing access to private property where the purpose and effect of their entry is to inform people about things which affect the decision-making process. Still, these benefits must be balanced against the interests which would be compromised by facilitating access.

b. Public Accessibility of the Facility

One of the interests compromised by the proposal is the privacy interest the owner of a clinic enjoys in being able to run the facility as he or she sees fit. The extent of this interest, however, will largely depend on whether the clinic is "private" private property, or "public" private property.[114] This distinction recognizes that the greater the property is committed to public use, the lesser the chance that permitting unconsented access to persons providing relevant information will result in "substantial privacy interests . . . being invaded in an essentially intolerable manner.[115] The fact that a property owner operates a business that depends on the entry of the public to prosper suggests that the privacy interest in the property is not strong.[116]

In the case of abortion clinics and Operation Rescue activity, the proposal would only permit access to clinics open to the public, and only on the grounds apart from the inside of the building. The need to conduct the operation of the clinic free from interference and distractions suggests that the privacy expectation inside the building is great enough to override any grant of unconsented access within the clinic itself. The proposal, however, would only convey a privilege on the outdoor portion of the property, where the privacy interest is much weaker.

---

113. *See supra* notes 60-63 and accompanying text.

114. "Public" private property generally refers to property which the owner has voluntarily placed into the public realm by committing it to some degree of public use. Owners of this kind of property must normally accept the reasonable consequences of being publicly accessible. *See* Carey v. Brown, 447 U.S. 455, 469 (1980). "Private" private property, such as a residence, is property which is not committed to public use.

115. 403 U.S. at 21.

116. *See* Allen v. Combined Communications, 7 Media L. Rep. 2417 (Colo. Dist. Ct. 1981).

c. Value of the Property Not Significantly Decreased

The test formulated by the Supreme Court in *Pruneyard* calls for an examination of how substantially a state's promotion of free speech impairs the value of the property affected.[117] In *Pruneyard*, the Court emphasized that the orderly solicitation of signatures for a petition at a private shopping center would not "unreasonably impair the value or use of [the] property as a shopping center.[118] In evaluating the adverse impact of the free speech activity on the value of the property, the Court focused its analysis on how significantly the activity interfered with the intended use of the property, rather than on a general inquiry into the amount of lost revenue resulting from the speech.

The *Pruneyard* Court pointed out that the shopping center was open to the public at large, and that state restrictions requiring the expressive activity to be orderly and limited to common areas were reasonable.[119] Clearly, the presence of an organized group with their own agenda in front of a store may dissuade shoppers from entering the store (although depending on the status of the group and the individual shopper, such a presence may also encourage patronizing that particular store), but for purposes of determining if the economic value had been impaired enough to constitute a constitutional "taking," the Court concluded that the primary concern was the store's ability to operate the business despite the unconsented entry.

The activity permitted through the proposal, and its impact on a clinic, is analogous to the effect on the property in *Pruneyard*. The purpose of the clinic is to provide health care services to the public. Where the service is provided exclusively indoors, as with an abortion clinic, a law decriminalizing certain trespasses only on the outdoors portion of the property will have no impact on the clinic owners' ability to provide the service. Although the proposal may enable groups to persuade individuals from patronizing the health care facility, the facility's ability to operate is not economically impaired to the extent that a constitutional "taking" has occurred.

d. Right to Choose Not Impermissibly Burdened

Although the Supreme Court in *Akron* prohibited a state from requiring certain disclosures partly because of the impact

117. 447 U.S. at 83.
118. *Id.*
119. *Id.*

they may have on the discretion of the physician,[120] the core of the abortion right is nevertheless a *woman's* freedom to decide whether or not to terminate her pregnancy.[121] Since the proposal is designed to provide a greater range of information regarding health choices than is currently available from other sources, the impact on a woman's abortion decision is clear. By facilitating the provision of more comprehensive disclosures, rather than requiring it, the proposal cannot be regarded as an unjustified government interference pursuant to the reasoning in *Akron*. Furthermore, the Court's decisions in *H.L. v. Matheson*,[122] and *Webster v. Reproductive Health Services*,[123] held that a state may take measures to encourage childbirth over abortion.

In *Matheson*, the Court held that a state may legitimately pursue a policy favoring childbirth over abortion to the extent of refusing to pay for abortions which women could not otherwise afford. Writing for the majority in *Matheson*, Chief Justice Burger stated that the Constitution "does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions."[124] In *Webster*, the Court restated this rule even more explicitly by approving a Missouri statute which forbids the expenditure of public funds or use of public facilities for the purpose of performing abortion procedures.[125] So while the *Akron* rule forbids a state from requiring private parties to discourage the abortion option, the state may nevertheless withhold state services in order to discourage abortion pursuant to the rationale in *Matheson* and *Webster*.

By withholding the state's ability to criminally sanction trespasses designed to either encourage or discourage abortion, or any other health choice, the proposal does not constitute any more of an unjustified interference than the state actions in *Webster* and *Matheson*. If, on the other hand, the proposal decriminalized *only* the giving of information calculated to discourage a woman from opting in favor of abortion, then the proposal might constitute an unjustified state interference as in *Akron*. By permitting trespass for the purpose of providing

120. *See supra* notes 104-08 and accompanying text.

121. *See* Jipping, *Informed Consent to Abortion: A Refinement*, 38 CASE W. RES. L. REV. 329, 363-72 (1988). Jipping argues that despite language in the Court's abortion decisions suggesting that the woman's right is subject to, or coextensive with, her physician's discretion, the physician possesses no constitutional rights independent of the patient. *See also* Asaro, *supra* note 103.

122. 450 U.S. 398 (1981).

123. 109 S. Ct. 3040 (1989).

124. 450 U.S. at 413.

125. 109 S. Ct. at 3042.

"necessary" information, however, the proposal does not distinguish between information which either encourages or discourages the person making the choice. In this regard, the proposal is even less of an interference than in *Webster* and *Matheson*, and is therefore presumptively valid.

B. *The Proposal Is Consistent with Current Public Policy Objectives*

The fact that a law is constitutionally permissible and consistent with judicial reasoning does not necessarily mean that such a law promotes public welfare enough to justify its enactment. This proposal is premised on the idea that a fully informed choice is better than a less than fully informed choice. In the context of abortion, the fact that *Akron* prohibits the state from requiring health-care providers to fully inform patients makes it reasonable to assume that some health choices are made without a complete understanding of the implications and alternatives.

When intelligent consumer decisions can only be made with a full disclosure of the implications and alternatives, the government frequently enacts legislation calling for disclosures as a means of protecting the consumer. For example, in transactions involving consumer credit,[126] securities[127] and insurance,[128] Congress has made laws premised on the idea that a fully informed choice is better than a less than fully informed choice. Furthermore, in the context of health care, courts have similarly affirmed this idea in the area of wrongful birth claims[129] and cases involving the standard of care a physician owes to a patient.[130]

1. Congressional Recognition of the Importance of Fully Informed Choices

The Federal Truth in Lending Act[131] illustrates one of the clearest examples of a regulation designed to facilitate fully informed choices, thus preventing the public from making harmful decisions. The purpose of the Act is "to promote the informed use of consumer credit by requiring disclosures about its terms and costs. The regulation also gives consumers the

126. Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* (1981).

127. Securities and Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (1982).

128. Federal HMO Act of 1973, 42 U.S.C. § 300e (1973).

129. Smith v. Cote, 513 A.2d 341 (N.H. 1986).

130. *See, e.g.*, Cooper v. Roberts, 286 A.2d 647 (Pa. 1971); Wilkinson v. Vesey, 295 A.2d 676 (R.I. 1972).

131. 15 U.S.C. § 1601 *et seq.* (1981) (hereinafter, "the Act").

right to cancel certain credit transactions . . . ."[132] Similarly, Rule 10b-5 of the Securities and Exchange Act of 1934[133] facilitates more fully informed choices by requiring corporations to disclose to investors information which is "material" to the sale or purchase of securities.[134] Finally, Congress promotes fully informed choices with regard to health insurance through regulations which set minimum disclosure requirements for federally qualified Health Maintenance Organizations.[135]

With each of these sets of regulations, Congress made a determination that consumers would be more inclined to make harmful sales and purchases if the parties from whom they bought and sold were free to withhold relevant information. Consequently, Congress enacted disclosure regulations in order to give the consumer a chance to make a truly informed decision. Although the proposal does not go so far as to mandate full disclosures[136] regarding health choices, the effect would be to make such disclosures somewhat easier. In this regard, the proposal promotes the governmental objective of making consumer decisions more fully informed without going beyond constitutional limitations.

2. Judicial Recognition of the Importance of Fully Informed Choices

In addition to legislative enactments, courts frequently make rulings which suggest that a fully informed choice is more worthy of protection than an uninformed choice. This is particularly true in cases dealing with wrongful birth claims. For example, in *Smith v. Cote*,[137] a physician failed to discover that a pregnant woman had rubella—a disease which, if exposed to the fetus, could potentially result in birth defects—and thus deprived the woman of information on which she would have an abortion. The New Hampshire Supreme Court upheld the wrongful birth claim, stating that failure to disclose the information and advise the parents of the abortion option was an "invasion of the parental right to decide whether to avoid the birth of a child with congenital defects."[138] Such a result, the Court reasoned was necessary to maintain the "interest in pre-

132. 12 C.F.R. § 226.1(b) (1981).
133. 15 U.S.C. § 78A-78LLL (1982) (hereinafter "the 1934 Act").
134. 17 C.F.R. § 240.10b-5 (1987).
135. 42 C.F.R. § 417.236 (1990).
136. To do so would be impermissible according to the holding in *Akron*. *See supra* at 1025-26.
137. 513 A.2d 341 (N.H. 1986).
138. *Id.* at 348.

serving personal autonomy, which may include the making of informed reproductive choices."[139] In his concurrence, Justice Souter[140] suggested, without stating specifically, that physicians morally opposed to abortion might avoid liability for failing to inform patients fully so long as such physicians make a "timely referral to other physicians who are not so constrained."[141]

In cases involving the standard of care a physician owes to a patient, courts frequently rule that the more informed a health choice can be, the better. In *Cooper v. Roberts*, the court stated that a physician is bound to disclose "those risks which a reasonable man would consider material to his decision whether or not to undergo treatment."[142] Similarly, in *Miller v. Kennedy*, the court stated that "the scope of the duty to disclose information . . . is measured by the patients' need to know."[143] These rulings suggest an orientation, as with the legislative enactments discussed above, focused on the patients' rights in a consumer/contract style of health care providing. In the same way, the proposal facilitates only the provision of relevant information, while leaving the final decision in the hands of the person making it.

C. *The Proposal Is Neither Harmful Nor Morally Offensive*

This section takes a detailed look at the Operation Rescue situation, focusing on two issues: (1) the "justifiability"[144] of Operation Rescue civil disobedience and (2) the extent to which the application of criminal trespass statutes to Operation Rescue activities possess a foundation either in the harmfulness or the offensiveness of the activities. We contend that the application of criminal trespass statutes to Operation Rescue activities lacks foundation on both counts. The proposal is constructed with Operation Rescue activities in mind, but we believe that any actions which fit its provisions will also be actions concerning which the application of the criminal trespass statute would lack foundation. Our goal, therefore, is to recommend the equity of the proposal by showing that Operation Rescue activities, *as an instance* of an action which would be

139. *Id.*

140. Now an Associate Justice on the U.S. Supreme Court.

141. *Id.* at 355 (Souter, J., concurring).

142. 286 A.2d 647, 650-51 (Pa. 1971).

143. 522 P.2d 852, 860 (Wash. 1974).

144. For the precise sense in which acts of civil disobedience can be justified, see *supra* at 1004-05.

exempted by the proposal, are neither harmful nor offensive. These two concerns must be treated separately.

1. Harmfulness

First consider the harmfulness of Operation Rescue activities.[145] Calculating the harmfulness of any action is an inexact process,[146] but considerations can be presented in this case to justify the conclusion that Operation Rescue activities are not harmful when the relevant features and effects are taken into account. It is useful to break the discussion into considerations related to short-term and long-term harmfulness. In the short-term, the parties adversely affected are the pregnant woman and the owner of the clinic,[147] and so these parties are considered first.

The harm which may be incurred by the clinic owner is the loss of revenue should the pregnant woman choose not to carry through with the procedure. The harm which may be incurred by the pregnant woman (assuming that the Operation Rescue participants act non-violently, as is their stated policy) amounts to varying forms of mental distress[148] in reaction to the attempts by the Operation Rescue participants to provide information they have reason to believe she lacks. To consider the interplay of these factors, the situation can be divided into five possible scenarios involving Operation Rescue activities around a clinic.

First, no pregnant women approach the clinic. Second, a pregnant woman open to receiving new information relevant to her choice (either by decision or disposition) approaches the

145. At issue here is the harmfulness of Operation Rescue activities in the absence of laws to the contrary, i.e. in a world in which the proposed amendment had been adopted.

146. For a discussion of the difficulty of performing any utilitarian calculation, see *supra* note 6 and accompanying text.

147. Those concerned, as we are, that the fetus which the pregnant woman is carrying is an interested party in this matter may be offended to have harm or benefit to the fetus neglected in our calculations. If it were universally agreed that harm to the fetus was a relevant issue here, we would include it. It would make the calculations quite straightforward in favor of the Operation Rescue activists. In the interest of showing the strength of our position by defending it from weaker assumptions, we leave the fetus out.

148. Such as distress at being asked to reopen a "settled" matter or the distress involved in re-evaluating the relevant considerations, especially in the light of new information. Both of these would be effects that would be justifiably said to be caused by the Operation Rescue activists. It is possible that the pregnant woman might feel threatened, but this is not justifiably charged to conscientious activists.

clinic, but turns away because the information altered her choice. Third, a pregnant woman similarly open to new information approaches the clinic, but carries through with her intention even after receiving the information. Fourth, a pregnant woman not open to receiving new information approaches the clinic, but turns away, either: 1) because of the passive obstacle presented by the Operation Rescue participants, or 2) because she was nonetheless persuaded by the information. Fifth, a pregnant woman not open to new information approaches the clinic, and carries through with her intention despite the efforts of the Operation Rescue participants.

The first scenario involves no harm to either a pregnant woman or the owner of the clinic. It is included for completeness and to show that in the absence of a pregnant woman there is no harm involved in Operation Rescue activities. The second and fourth scenarios involve financial loss to the owner of the clinic, so in those instances Operation Rescue activities would be harmful unless there is evidence that this harm is adequately offset. The third and fifth scenarios involve no financial loss (and in fact include financial benefit), and thus in these instances the impact of the Operation Rescue participants' presence is harmful only if there is harm to the pregnant woman that exceeds the financial benefit to the owner.

The second and third scenarios involve the considerable benefit to the pregnant woman of being given the opportunity to make a more informed (and thus a more commendable) choice in the matter. For this reason the third scenario involves no significant harm. The second scenario is harmful only if the benefit to the pregnant woman does not exceed the harm by way of financial loss to the owner of the clinic, and while this is comparing apples and oranges, it would be perverse to judge financial concerns to be of greater significance than the pregnant woman's right and obligation to make as informed a choice as she can. Consequently, the Operation Rescue presence here cannot be definitively regarded as on balance harmful.

The fourth and fifth scenarios are not as tractable as the others because they involve the possibility that the Operation Rescue presence produces unjustified distress on the part of the pregnant woman. It should be noted that the distress that is relevant to this analysis is distress which is likely to involve an aversion on the pregnant woman's part to fulfilling her obligation to make as informed a choice as she can. This is not to say that the harm involved is not real; it is only to say that it is harm that is not completely the Operation Rescue participants' fault.

The fourth scenario needs to be divided into two more specific scenarios according to whether or not the pregnant woman turns away for rational or less than rational reasons. In the pregnant woman's turning away, it is evident that her prior decision to pursue an abortion at that time was *subjectively* too weak to carry the pregnant woman past all obstacles. But it remains possible that the pregnant woman's decision was, nonetheless, *objectively* strong, having been formed as the result of a highly rational process of deliberation. While it is unlikely that all decisions to pursue an abortion are made in a thoroughly rational manner, it will be sufficient to show that Operation Rescue activities are not harmful even on the assumption of highly rational prior decisions. Interfering with less than rational decisions can only be less harmful than interfering with highly rational ones.

Suppose, then, that the pregnant woman, having made the decision to pursue an abortion in a highly rational manner, turns away from the health care facility for some irrational reason connected with the presence of the Operation Rescue activities. In this situation have the Operation Rescue activities been productive of harm? There are two ways in which the activities might be thought harmful: either by causing emotional distress to the pregnant woman, or by causing a failure of rationality on her part. It is likely that Operation Rescue activities produce some emotional distress to the pregnant woman, but so will any activity that touches on her decision. And while some Operation Rescue activists may cause illegitimate distress by engaging in activities explicitly proscribed by Operation Rescue, our concern here is only Operation Rescue activities as ideally conceived. Ideally conceived, Operation Rescue activities produce emotional distress precisely as much as any attempt to encourage the pregnant woman to forego an abortion. Concerning the production of emotional distress, Operation Rescue activities ideally conceived are no more objectionable than public service announcements encouraging adoption. If the emotional distress is sufficient to lead the pregnant woman to turn away in spite of her firm and rational conviction, then that distress cannot be completely attributed to the Operation Rescue activities, i.e. it does not pose an *objective* threat to the woman's safety. Her distress is very real, but the Operation Rescue activities are not themselves sufficient to produce it.

A second potential source of harm in this scenario involving a pregnant woman who has made a prior highly rational choice is the harm of causing a failure of rationality on the part

of the pregnant woman: she may turn away for non-rational reasons despite her prior resolve. (Regardless of the firmness of the prior resolve, if the pregnant woman turns away for rational reasons, the benefit of having made a more informed choice outweighs the financial loss to the owner.) If the pregnant woman turns away for non-rational reasons, however, it is not necessarily the case that there was a failure of rationality (i.e. an irrational choice). A person acts *ir*rationally only if she fails to do what rationality *requires*. Since pursuing an abortion is not rationally required, failure to pursue it (for whatever reasons) will only involve choosing another course of action *also rationally permissible*. While Operation Rescue activities may persuade the pregnant woman to pursue another course of action, so long as that course is itself rationally permissible, there is no harm for the reason of causing a failure of rationality. The fourth scenario is clearly complex, but because the Operation Rescue activities do not cause a failure of rationality and are not sufficient for the production of emotional distress, the scenario turns out to be too close to call: if the pregnant woman turns away for rational reasons, the effect is marginally one of benefit; if for less than rational reasons, the effect is marginally one of harm.

In fairness, the fifth scenario is not too close to call and involves uncompensated distress to the pregnant woman. It is true that the pregnant woman continues to possess an obligation to make as informed a choice as is reasonably possible, but still in this scenario the Operation Rescue presence contributes to emotional distress without effectively causing a more informed choice. What judgment, then, can be rendered about the harmfulness of Operation Rescue activities when these scenarios are taken together? After factoring the first scenario out, we are left with the second scenario which involves unmixed benefit, the fifth which involves uncompensated harm, and the third and fourth which are too close to call with assurance. The results appear to cancel each other out, if we assume that the possibilities are equally likely. Given the assumption that the possibilities are equally likely, the judgment must be that on balance Operation Rescue activities, while not certainly productive of benefit, are also not productive of harm either. If this judgment is accepted, the application of the criminal trespass statute to Operation Rescue activities fails to possess a foundation in the short-term harmfulness of the action prohibited.

Consideration of the long-term harmfulness of Operation Rescue activities (if rendered legal by the proposal) is, while

less certain of being comprehensive, more easily carried out. Allowing the criminal trespass statute to be qualified in this way, thus allowing Operation Rescue activities on private health care facilities despite disapproval by the owner of the property, may possibly contribute to a general disregard for property rights. While this would be a grave harm to society in general, it is both unlikely that it would occur and unreasonable to think that the harm would be caused by the Operation Rescue participants. If a disregard for property rights did result, it would be the result of a mistaken or perverse understanding of the purpose and function of the proposal.

There is thus no compelling reason to think that Operation Rescue activities are productive of long-term harm, and taken with the judgment above that such activities are not productive of short-term harm, we conclude that Operation Rescue activities are not on balance harmful. If the application of criminal statutes to Operation Rescue activities is to have foundation, it must be based on an argument that Operation Rescue activities are offensive based on all of the relevant considerations, and it is this possibility to which we turn next.

2. Offensiveness

The analysis of the extent to which Operation Rescue activities are offensive to human moral sensibilities[149] will be conducted by considering two different methods: first, an intuitionist analysis, and second, a rationalist analysis. Our conclusion is that neither method judges Operation Rescue activities to be offensive, and we therefore find that the application of criminal trespass statutes to Operation Rescue activities also lacks the foundation it might have in the moral offensiveness of the activities.

Consider first an Intuitionist analysis. We gave a general account of the way this method is to be applied (recognition of *prima facie* rights and duties together with a judgment about the overriding or all-things-considered obligation) earlier,[150] but it is necessary to begin with a brief defense of the usefulness of the method and the problems that attend its application.

While there is an appealing algebraic[151] character to considerations about whether or not an action is on balance harm-

149. Hereinafter referred to as "offensiveness."

150. *See supra* at 999-1000.

151. Utilitarian calculations about the importance of consequences can be made to look like a matter of tallying scores: harms v. benefits. This score-keeping involves designating some common coin for commensurating

ful, inquiries into an action's offensiveness that are based in intuitions appear to be plagued with subjectivism. Granted, what one person finds offensive another sometimes finds quite pleasing, and there is often little hope of forcing an agreement; but this is surely not always so. There are a number of actions which are uniformly condemned. For example, nearly everyone finds the unnecessary inflicting of pain to be offensive. Those who do not find it offensive may in fact be immoveable on the subject, but when this problem manifests itself in action, they are punished by society. It should be noted that, when the case is not complicated, humans usually agree about whether the action in question is offensive, worthy of approval or of neutral value, and if life were a series of simple cases it is likely that we would be less likely to think of such judgments as highly subjective.

Before considering the offensiveness involved in the Operation Rescue situation, it is important to note the pivotal role which the description of an action plays in making the intuitional evaluation of complex cases (i.e. those cases in which competing rights and obligations are involved). Actions are evaluated only under a description; and in complex cases especially, the description will be partial: the evaluation will be based on only a partial account of the phenomenon. Some partial descriptions may be inadequate for such an evaluation because they treat the part as the whole or are unwittingly driven by prejudicial concerns. But not all partial descriptions are inadequate. A partial description which focuses on one aspect of the situation while still taking account of the other relevant parts of the whole may justifiably allow an evaluation of the whole itself. Operation Rescue activities can be described in many ways, and while there may be no purely objective way to determine THE definitive description, it is possible to give reasons why some descriptions are more illuminating than others.

When individuals differ about the appropriate moral evaluation of an action, usually they are evaluating the action under different descriptions, and often agreeing on a description is sufficient to settle the difference (since at root our moral sensibilities are not all that different). For this reason, it is most fruitful to focus on the description of Operation Rescue activities most appropriate for moral evaluation. We believe that a "most illuminating" description exists in this context, but we

types of benefits and harms and then producing a final score, for example, "harmful consequences defeat beneficial consequences 206 Hedons to 197."

consider six candidate descriptions. (The probable moral reaction/evaluation for each description is given in parentheses.)

> (D1) Operation Rescue activities are a case of conflict between advocates of Pro-Choice views on abortion and their opponents, Anti-Abortionists. (In this case, moral reaction/evaluation will depend upon the evaluator's antecedent views concerning that debate.)
>
> (D2) Operation Rescue activities involve the violation of the clinic operator's right to conduct legal business and to dispose of her property as she sees fit; moreover, this activity is detrimental to the financial success of the business. (Under this description, Operation Rescue activities are offensive.)
>
> (D3) Operation Rescue activities are an attempt to prevent the pregnant woman from exercising the illegitimate "right" to end another person's life. (It is at least non-offensive and possibly praise worthy to oppose the exercise of illegitimate rights.)
>
> (D4) In Operation Rescue situations, one person (the pregnant woman) is attempting to exercise a legal right and others (Operation Rescue activists) are attempting to prevent the exercise of a legal right. (It is offensive to violate the rights of others.)
>
> (D5) Operation Rescue activities are peaceful attempts to exercise the legal right of self-expression in a way that demonstrates the urgency of their concerns. (Free expression is at least non-offensive.)
>
> (D6) Operation Rescue activities involve the attempt by some persons to offer potentially overlooked information to an individual attempting to make a difficult moral decision; inconvenience to the proprietor and imposition on the person deciding are not intentionally increased. (Non-hostile, non-invasive attempts to provide assistance in making difficult decisions is at least non-offensive. It is the fulfillment of a moral obligation.[152])

It is not difficult to imagine each of these descriptions being used in an attempt to defend an evaluation of the offensiveness of Operation Rescue activities, but there are identifiable difficulties with all but the last of them.

The first description, D1, treats the situation as if the only issue involved was the broad social policy issue. It would be just as illuminating to characterize a debate about the morality of sport hunting as *just* a debate about the right to bear arms.

---

152. *See supra* at 1005-09.

In both the sport hunting and the Operation Rescue cases the larger social issue is *not* of central import, even if the situation is part of the broader discussion of the issue and even though the evaluator has much clearer convictions concerning it. A D1-based evaluation of the Operation Rescue phenomenon appears to take an illegitimate short-cut.

If the right to dispose of ancillary business property were even as inviolable as the right to dispose of private property, a description such as D2 might be both adequate and decisive. There is no question that Operation Rescue activities involve some violation of this right, but as we have indicated above,[153] this right admits of qualification and so cannot be the only consideration. An evaluation based on D2 would needlessly allow a part to stand for the whole.

The deficiency of D3 ought to be obvious, even if it is not hard to imagine it being offered as a justification of Operation Rescue activities (i.e. a reason to think such activities on balance not offensive). This is potentially both a misdescription and a treatment of the whole by reference to a part. If this were an adequate reason to find Operation Rescue activities non-offensive, then a number of more invasive techniques might also be held to be justifiable in pursuit of the end. It should be made clear that finding Operation Rescue activities on balance non-offensive does not imply that absolutely any other attempt to dissuade a pregnant woman from submitting to an abortion would also be non-offensive.

While it was easy to see why D1-D3 are not adequate, choosing between D4, D5 and D6 is not quite as simple. Quite a number of reasons could be given to favor each of these descriptions, but there would be considerable overlap. For instance, all three identify as a central concern the freedom of the individuals in the conducting of their affairs. It should be noted that only D6 characterizes the situation as involving the freedom of *both* the activists and the pregnant woman. In fact, given the gravity of our concerns about the protection of individual freedom, descriptions that appear to factor out any party's freedom should be held suspect. Inasmuch as we would be hesitant to value freedom of expression even over freedom to dispose of ancillary business property, we believe that descriptions like D5 do not succeed at presenting the situation in a way that makes Operation Rescue activities appear to be non-offensive. Thus, the interesting choice turns out to be between D4 and D6.

153. *See supra* at 1018-19.

To be fair to D4 (and to make it as plausible as possible) it is necessary to make it explicitly come to grips with the rights of the activists:

> (D4*) In Operation Rescue situations, one person (the pregnant woman) is attempting to exercise a legal right and others (Operation Rescue) are attempting to prevent the exercise of a legal right by exercising their duty (and therefore, right) to provide information essential to a moral choice.

Now, however, the offensiveness of Operation Rescue activities is not nearly as obvious. If such activities are still held to be offensive based on this description, it appears that the evaluator must think the mere exercise of a right must be applauded and insulated regardless of the amount of information that the individual exercising it possesses; that the exercise of a right in ignorance is at least as valuable as a right exercised on the basis of some approximation of complete information. This is a highly questionable premise. Moreover, D4* (as well as D4) appears to involve a misdescription in its indication that the activists seek to *prevent* the exercise of a right. This is not at all the case. What the "rescuers" hope to accomplish is that the actual right will be exercised in a way that they believe to be more felicitous to almost all concerned. The right involved is not best described as "the right to an abortion;" rather it is "the right to *choose* concerning an abortion." The "rescuers" do not intend to prevent *this* right from being exercised; on the contrary, this is precisely the right they wish to see exercised.

Our preference for D6 as an adequate description of the situation, and especially our focusing on the freedom to provide information on tough choices, depends upon the conviction that the right to make choices in general (the pregnant woman's central right here) is ideally a right to make informed choices, and in this connection the activities of the activists work toward the ideal. It may rightly be pointed out that the pregnant woman also has the right not to be harassed, but just how that right factors in is not entirely obvious. In the hypothetical example involving Smith and Jones,[154] Smith certainly possessed the right not be inconvenienced by someone attempting to point out his mistake. But in such a situation the offensiveness of a violation of this right to non-harassment will depend largely upon the degree of inconvenience involved. If Jones in the example given above had cut off Smith's hand to prevent the mistake we would be offended; if the informer sim-

154. *See supra* at 1007-08

ply snatched the chemicals away we might not, especially if there wasn't time to explain that an error was being made. Thus the offensiveness of a violation of the right to non-harassment depends upon the degree of inconvenience, and in the case of Operation Rescue activities we believe that the degree of inconvenience to the pregnant woman is not sufficient to render the activity offensive.

In the end the *conflict* of rights appears not to center on the pregnant woman's right to choose an abortion. The activities of Operation Rescue are compatible with the belief on the "rescuer's" part that she has such a right. Instead, the conflict is between the pregnant woman's right to make an inconvenience-free choice no matter how ignorant and the "rescuer's" right to provide information pertinent to the choice even if it involves a small degree of inconvenience. Considering the degree of inconvenience involved with Operation Rescue activities in conformity with the proposal, it seems hasty to consider the pregnant woman's right (thus construed) to be of greater import. Thus D6, with its emphasis upon the priority of informed choices, presents what appears to be an adequate description of the situation. On this description Operation Rescue activities do not appear to be offensive, and thus there is reason to believe that all things considered Operation Rescue activities are not offensive.

A Rationalist analysis like that described earlier[155] also relies in part on the description under which the action is considered, since a decision must be made about the nature of the principle upon which the action was based. Once that principle has been identified, all that remains is to submit the principle to the universalizability test: would we be willing to accept a world in which everyone acted upon that principle? An affirmative answer implies the judgment that actions based upon the principle are not morally offensive.

The requirements provided by the proposed amendment together with the considerations just given to favor D6 suggest that the following is the appropriate principle to consider:

> (P) I ought to act to provide informational assistance to the pregnant woman and treat the rights relating to informed moral choice as superior to rights relating to the disposal of ancillary business property just in case the requirements of the amendment are met (i.e. nonviolence and with the choice in its extremity).

155. *See supra* at 1000-01.

While this is a bit cumbersome it includes the salient details. Our conviction that Operation Rescue activities are not offensive according to this analysis relies upon the belief that the universalized form of the principle is acceptable:

> (UP) Everyone ought to act to provide informational assistance to anyone in need of it and treat the rights relating to informed moral choice as superior to rights relating to the disposal of ancillary business property just in case the requirements of the amendment are met.

We find UP to be acceptable because it amounts to the conjunction of the following two universal principles which we believe we have shown to be acceptable:

> (UPa) Everyone ought to act to provide informational assistance to others in need of it, and
> (UPb) The rights relating to informed moral choice are more urgent (of greater import) than the rights relating to the disposal of ancillary business property, at least under the conditions stipulated by the amendment.

UPa is simply the moral principle derived in section I.C above, and the acceptability of UPb is suggested by prior restrictions placed on the right to the disposal of such property.[156] On the Rationalist method, then, Operation Rescue activities are not found to be offensive.

The conclusion of this section is that Operation Rescue activities are neither on balance harmful nor offensive. Consequently, application of the criminal trespass statute to Operation Rescue activities fails to possess the necessary moral foundation.[157] The proposed amendment is offered to remedy this over-generalization in the present statute, i.e. to prevent the statute from being applied without moral foundation. Thus, the proposed amendment is both warranted and beneficial.

V. CONCLUSION

Both ethical and legal considerations have been marshalled to support two conclusions. First, that as the criminal trespass statute is currently applied, Operation Rescue activities constitute "justifiable" instances of civil disobedience. Second, the insufficient foundation for the application of the

156. *See supra* at 1018-19.

157. The same conclusion could be reached concerning any application of the statute to actions which genuinely have UP as their motivating principle, although an argument might be needed to show non-harmfulness in those situations.

statute in the Operation Rescue context indicates that amendment to the criminal trespass statute is justified. Accordingly, an amendment specifying the narrow range of actions for which the statute lacks justified application has been offered which would make the statute more sensitive to the rights related to the making of an informed practical health choice.